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IN THE

Supreme Court of the United States

October Term, 1970

No. ———

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

AUBURNDALE FREEZER CORPORATION, MINUTE MAID COMPANY, AND NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on December 28, 1970.

OPINIONS BELOW

The decision and order of the National Labor Relations Board, 177 NLRB No. 108, 71 LRRM 1503, is reproduced in the Appendix to this petition at *App.* 17-39.[1] The opinion of the Court of Appeals is reported at —F.2d —, 75 LRRM 2752, and is reproduced in the Appendix to this petition at *App.* 1-16.

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[1] The Appendix to this petition is separately paginated, and is referred to herein as "*App.*"

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1970. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254(1).[2]

QUESTION PRESENTED

A manufacturer stores his goods in an independent warehouse until they can be sold. A union engaged in a primary dispute with the manufacturer pickets the truck and rail entrances to the warehouse, urging common carrier employees not to pick up the primary employer's goods. Is that picketing "primary" (as the board held) or a secondary boycott violative of Section 8(b)(4) of the LMRA (as the court below held)?

STATEMENT OF THE CASE

Cypress Garden Citrus Products, Inc. (hereinafter "Cypress") is engaged in the business of processing citrus fruits and products, including citrus concentrate, at a plant in Eloise, Florida (*App.* 2, 18-19). Because citrus harvesting is seasonal, Cypress produces its citrus concentrate mostly during the months of March through July, places the concentrate in cold storage, and sells it on a year-round basis as orders are received. (*App.* 9, 19; A. 80).[3]

Cypress maintains a cold storage warehouse on its own premises, but this warehouse cannot hold all the concentrate it produces (A. 94). Accordingly, Cypress also stores concentrate in a warehouse owned by respondent Auburndale Freezer Corporation (hereinafter "Auburndale"), located five or six miles from the Cypress plant (*App.* 2-3). During the "peak" growing season—March through July—

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[2] The instant petition is being filed on the 91st day, but is timely because the 90th day was a Sunday. *Union National Bank* v. *Lamb*, 337 U.S. 38, 40-41 (1949).

[3] As used herein, "A" refers to the Appendix in the court below.

Cypress' trucks, driven by Cypress' employees, "continuously" deliver cases and drums of concentrate to the Auburndale waerhouse (*App.* 19).[4] Employees of respondent Minute Maid Company, who perform all the labor at the Auburndale warehouse, unload the Cypress trucks, store the concentrate in the warehouse, and give a receipt to the Cypress driver who then returns to the plant (*App.* 19).

During the remainder of the year, as Cypress receives orders for concentrate, it arranges with common carriers (truck and rail) to pick up the concentrate at the Auburndale warehouse and deliver it to the customer. Pursuant to shipping instructions which Cypress gives to Auburndale, Minute Maid employees load the common carriers' trucks and/or rail cars when they arrive at the warehouse to pick up the concentrate (*App.* 9-10, 19; A. 80).

Occasionally, Cypress wishes to have drums of concentrate returned to its plant from the Auburndale warehouse for repackaging into cases (See n. 4, *supra*). In those instances, Cypress' trucks, driven by Cypress' employees, come to the Auburndale warehouse, and Minute Maid employees load the drums of concentrate onto the trucks (*App.* 9; A. 78).

Cypress has been storing its concentrate at the Auburndale warehouse since the latter was opened in 1956 (*App.* 8, 21; A. 87-88). At the critical period involved in this case, Cypress and Auburndale were parties to a five-year contract (negotiated in January, 1967), under which Auburndale guaranteed storage space for up to 300,000 cases of Cypress concentrate (approximately 10% of the total space in the Auburndale warehouse), and Cypress agreed

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[4] "Cases" of concentrate are ready for market, and weigh approximately 22½ pounds (A. 90, 99). "Drums" of concentrate contain 55 gallons, and must be repackaged into cases before marketing (A. 90-91). Some of the drums are sold to customers who do the repackaging themselves; others are returned from the Auburndale warehouse to the Cypress plant so that Cypress can repackage them for sale (A. 90-91).

to pay a minimum annual rental of $25,000 per year, and a maximum of $45,000 per year (depending upon the number of cases actually stored), plus a servicing charge (*App.* 9; A. 108-110).[5]

Petitioner (hereinafter "the Union") is the collective bargaining representative of Cypress' employees. On October 15, 1967, as a result of a breakdown in contract negotiations, the Union called a strike of Cypress' employees (*App.* 3). At the time the strike began, Cypress had 150,000 cases of concentrate stored at the Auburndale warehouse (*App.* 20, 21). On October 17, 1967, the Union posted pickets at the truck and railroad entrances to the Auburndale warehouse, carrying signs which read:

> "Employees of Cypress Garden Citrus Products are ON STRIKE. We have no dispute with any other employer. United Steelworkers of America, Local 6991, AFL-CIO." (*App.* 3).

The Board found (*App.* 22-23) that the sole purposes of the Union's picketing at the Auburndale warehouse were (1) to induce employees of common carriers not to pick up Cypress concentrate stored there, and (2) if Cypress sent its trucks to the warehouse to pick up concentrate for return to the Cypress plant, to induce the drivers not to pick up the concentrate. There was no evidence that the operations of any other firm which stored goods in the warehouse were interrupted or interferred with in any way (*App.* 10).

Auburndale and Minute Maid filed charges with the Board alleging that the picketing at the Auburndale warehouse was a secondary boycott violative of Section 8(b)(4) of the Labor Management Relations Act of 1947, 29 U.S.C. § 158(b)(4).[6] The Board, by a vote of 3-2, concluded that

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[5] A case of concentrate weighs 22½ pounds (A. 99). Thus the contract guaranteed Cypress the right to store up to 6,750,000 pounds of concentrate in the Auburndale warehouse at all times.

[6] The relevant portion of Section 8(b)(4) is quoted *infra*, at *App.* 1, n. 1.

the picketing was "primary," and therefore lawful. The majority noted that (*App.* 22):

> "the concentrate, while stored at the Auburndale warehouse is, for all practical purposes, under the control of Cypress, . . . the warehouse is the place where common carriers receive Cypress goods for delivery to Cypress' customers, . . . there is substantial contact between Cypress, its employees, and the Auburndale warehouse, and . . . the storage of concentrate at the warehouse, which practice has been continuous since 1956, constitutes an integral part of the Cypress production process."

Further noting that the picketing was by its terms "directed solely to the primary employer, Cypress" (*App.* 22), the majority concluded that appeals "to such common carrier employees as might approach the warehouse to pick up Cypress' products, . . . would, under the circumstances, constitute legitimate primary action" (*App.* 23). In support of this conclusion, the majority cited this Court's decisions in *Local 761, International Union of Electrical Workers* v. *NLRB* [*General Electric*], 366 U.S. 667 (1961), and *United Steelworkers of America* v. *NLRB* [*Carrier Corp.*], 376 U.S. 492 (1964).

The dissenting Board members argued that the picketing could not be primary because no employees of Cypress worked at the Auburndale warehouse (*App.* 26-27). The dissenters did not cite, let alone attempt to distinguish, this Court's decisions in *General Electric* and *Carrier.*

Auburndale and Minute Maid petitioned for review of the Board's decision, and the court below, by a vote of 2-1, concluded that the picketing was "secondary" and therefore unlawful. The majority (Judges Coleman and Jones), recognized this case to be "of supreme public importance" (*App.* 5). Without citing a single 8(b)(4) decision, the majority declared that "The picketing was prohibited by

the plain terms of the statute" (*App.* 7).[7] The majority reasoned that since no Cypress employees worked at the Auburndale warehouse, picketing there could not be primary (*App.* 6). As frosting on the cake, the majority discerned—with no evidentiary support in the record—that the "real object" of the picketing was to shut down all operations at the Auburndale warehouse:

> "We hold that the real, indeed the only substantial, object for the picketing at Auburndale, by means of a picket line away from the true situs of the controversy, was to shut down operations at a frozen food storage warehouse in which the stored products of the primary employer then constituted only 5% of the total capacity of the facility and could never have exceeded ten percent. Inescapably, the purpose was to halt the operations of other employers who were entitled to use not less than 90% of the space and who were total strangers to the whole controversy" (*App.* 7).

Judge Wisdom dissented. In his view, the Board's conclusion that the picketing was "primary" was a correct application of this Court's decisions in *General Electric* and *Carrier*. He reasoned that storage at the Auburndale warehouse was an integral part of Cypress' production process, that the Union's picketing was for the purpose of disrupting that process (by inducing employees of common carriers not to pick up Cypress' concentrate), and that such picketing is "primary" under this Court's decisions (*App.* 11, 15):

> "It is a fair statement that the storage of concentrate in the warehouse subject to disposition by Cypress constituted the final step in the Cypress production process.

* * * * * *

---

[7] Thus the majority's literal approach is proof of what this Court said in *General Electric*, 366 U.S. at 672: "This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary picketing."

"[T]he Board properly found that Cypress was engaged in its normal business operations at the warehouse during the picketing, and that the Union picketed the warehouse for the primary object of disrupting those operations.

"Here where the primary employer's operation is carried on not only at his own plant but also at a neutral employer's premises, the union must be permitted to appeal to those employees at the latter site who are performing work intimately connected with the struck employer's normal business operations. See, e.g., *United Steelworkers of America, AFL-CIO (Carrier Corp.)* v. *NLRB,* 1964, 376 U.S. 492, 499-500, in which the Supreme Court held that the union could permissibly appeal to employees of a neutral common carrier on the carrier's own premises because it was furnishing day-to-day service essential to the primary employer's regular operations. See also, *International Brotherhood of Electrical Workers, Local 480* v. *NLRB (Gulf Coast Bldg. & Supply Co.),* D.C. Cir. 1969, 413 F.2d 1085, 1090, n. 7.

" 'The essential factor which renders the analysis in General Electric and Carrier applicable to Auburndale . . . is the integral relationship of the particular facility picketed to the operations of the struck employer . . . *Samoff* v. *Oil, Chemical & Atomic Workers, Local 8-732,* D.C. Del. 1969, 307 F. Supp. 434, 439.' " (Footnotes omitted.)

REASONS FOR GRANTING THE WRIT

I

As the Court below recognized, "This case is of supreme public importance" (*App.* 5). One of the major factors determining the success of every strike is whether the employer is able to ship to customers the goods which were produced prior to the outbreak of the strike. It is well

established that a striking union may seek to induce employees of common carriers not to pick up those goods from the primary employer's plant. *Local 761, International Union of Electrical Workers* v. *NLRB* [*General Electric Co.*], 366 U.S. 667, 680-681 (1961); *United Steelworkers* v. *NLRB* [*Carrier Corp.*], 376 U.S. 492, 499 (1964); *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 389 (1969). The instant case poses a closely related issue: if the primary employer has rented space for storage of some of his goods in an independent warehouse, does the striking union lose its right to appeal to employees of common carriers not to pick up those good?

The Board concluded that the principles enunciated by this Court in *General Electric* and *Carrier* are equally applicable whether the primary employer's goods are stored at his own plant or in an independent warehouse. Judge Wisdom, dissenting below, agreed with the Board. The majority opinion in the court below did not really come to grips with this issue, for it proceeded on the premise that all picketing directed solely to neutral employees is unlawful, a premise which has been expressly rejected by this Court three times. *General Electric*, 366 U.S. at 680-681; *Carrier*, 376 U.S. at 497-499; *Jacksonville Terminal*, 394 U.S. at 389.

We believe, with Judge Wisdom, that the Board's conclusion necessarily follows from *General Electric* and *Carrier*, and we will briefly demonstrate below why that is so. But even if the issue were more doubtful than we think it is, the recurring nature of the problem dictates its prompt resolution by this Court. In the court below, briefs *amicus curiae* were filed by The American Warehousemen's Association and the National Association of Refrigerated Warehouses, Inc., each emphasizing that the issue posed by the instant case is one of widespread importance. The former, for example, pointed out that more than $50,000,000,000 of the United States annual gross national product is

handled through warehouses (Brief for American Warehousemen's Association, p. 2), and that the majority of warehouse customers have goods stored "continuously" (*Id.*, p. 3).[8]

II

The decision below conflicts with principles enunciated by this Court in *General Electric* and *Carrier*. In those cases, this Court held that "primary picketing" encompasses not only appeals to primary employees to withhold their services from their employer, but also appeals to secondary employees not to perform duties "connected with the normal operations of the [struck] employer." *Carrier*, 376 U.S. at 497. See also *General Electric*, 366 U.S. at 680-681; *Jacksonville Terminal*, 394 U.S. at 389. The employees of common carriers (truck and railroad), whose duty is to pick up the primary employer's goods and transmit them into the stream of commerce, are within the ambit of those to whom the striking union may address its appeal. *Ibid.*

In *General Electric* and *Carrier* the goods were stored on the primary employer's premises. But the economic realities are wholly unchanged when, as here, some of the employer's goods are stored in an independent warehouse. The employer's interest in transmitting his goods into the stream of commerce is identical, and the union's interest in preventing that occurrence, i.e. in "halting the day-to-day operations of the struck employer" (*Carrier*, 376 U.S. at 499), likewise is identical. The Board concluded—and Judge Wisdom agreed—that the storage of the concentrate at Auburndale's warehouse was as integral a part of Cypress' operations as if stored on Cypress' own premises. In practical

[8] The identical issue was posed, subsequent to the Board's decision in the instant case, in *Samoff* v. *Oil, Chemical & Atomic Workers*, 307 F. Supp. 434 (D. Del. 1969). The Court concluded that in light of *General Electric* and *Carrier* the striking union was entitled to picket at a neutral warehouse asking employees of common carriers not to pick up the primary employer's goods.

effect, the leased space in the warehouse was an extension of Cypress' plant.

To be sure, the Auburndale warehouse also stored the goods of other manufacturers. But that did not warrant precluding all picketing by the Union; rather, it imposed an obligation upon the Union to make clear that its dispute was limited to Cypress. The Union did precisely that, and there is no evidence that pickups and deliveries of the other manufacturers' goods were interrupted in any way. Thus the situation here was no different from *Carrier,* where the railroad gate—located on the neutral employer's property—served several manufacturers in addition to the struck employer. "The railroad employees were not encouraged to, nor did they, refuse to serve the other plants." *Carrier,* 376 U.S. at 499. As this Court later explained in *Jacksonville Terminal,* 394 U.S. at 389, the holding in *Carrier* was that:

> "striking employees could picket to induce a neutral railroad's employees to refuse to pick up and deliver cars for the struck employer—even though the picketed gate was owned by the railroad, and the railroad's employees would have to pass by the place of picketing to pick up and deliver cars for other plants that were not struck." [9]

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[9] *See also NLRB* v. *Fruit & Vegetables Packers* [*Tree Fruits*], 377 U.S. 58 (1964), holding that unions may engage in consumer picketing at retail stores, provided their appeal is limited to the products of the struck employer.

CONCLUSION

For the reasons set forth hereinabove, certiorari should be granted.

Respectfully submitted,

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OPINION OF THE COURT OF APPEALS

No. 28522

AUBURNDALE FREEZER CORPORATION AND MINUTE MAID COMPANY,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

AND

UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Intervenor.

Before JONES, WISDOM, and COLEMAN, Circuit Judges.

COLEMAN, Circuit Judge:—The issue for decision is whether a labor union by picketing the premises of neutral employers committed a secondary boycott in violation § 8 (b) (4) (i) and (ii) (B) of the National Labor Relations Act, as amended.[1]

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[1] 29 U.S.C.A. § 158(b) (4) (i) and (ii) (B).

Section 8(b) (4) of the amended Act makes it an unfair labor practice for a union

(i) to engage in, or to induce or encourage any individual * * * to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service; or

(ii) to threaten, coerce, or restrain any person * * * where in either case an object thereof is:

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *; Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

The Hearing Examiner found in the affirmative and recommended the issuance of a cease and desist order. The National Labor Relations Board, by a vote of 3 to 2, held to the contrary, dismissing the consolidated complaints.[2]

We grant the petition for review, vacate the Order of the Board, and remand for the entry of the recommended cease and desist order.

The neutral employers were Auburndale Freezer Corporation and Minute Maid, another corporation.

Auburndale is the sole owner of a public cold storage warehouse at Auburndale, Florida. It has only three employees, a general manager, an office secretary, and a maintenance man.

By contract with Minute Maid, the work of unloading deliveries to the warehouse, furnishing bills of lading, placing contents in storage, and servicing outgoing shipments on freight cars and trucks (common carriers) is performed by thirty employees of Minute Maid. Those employees work under the direction of Minute Maid's superintendent, who takes his instructions from Auburndale's general manager.

Auburndale's freezer plant can store approximately three million cases of citrus concentrate at any one time. Auburndale has about *twenty* cold storage customers, such as Minute Maid, from its nearby citrus processing plant, General Foods, Florida Home Juice, Cypress, and others.

About five or six miles from Auburndale, at Eloise, Florida, Cypress Gardens Citrus Products, the primary employer in this dispute, operates a citrus processing plant, including some warehouse facilities. No employee of Cypress has ever worked at the Auburndale warehouse. Cypress had a contract with Auburndale which obligated the latter to furnish the former storage space for up to 300,000 cases of citrus

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[2] 177 NLRB No. 108, 71 LRRM 1503, June 30, 1969.

concentrate (approximately 10% of the Auburndale storage space) at a specified price. If Cypress wished to store any of its processed products at Auburndale its trucks, loaded with its product, driven by its employees, went to the warehouse facility. The Minute Maid employees unloaded the Cypress trucks by forklift and placed the product in storage. A receipt was given the Cypress driver, who then left the warehouse. Cypress is not allotted any particular portion of or space in the warehouse. Its goods, however, are placed in identifiable rows or stacks, as is the case with other customers of the warehouse. When Cypress sold the goods (not at retail) it issued Auburndale instructions to ship the product. The Minute Maid employees then load the goods, as per instructions, on either railroad cars or trucks.

The busiest period at Auburndale is from March until July, peaking in June, the height of the citrus season.

On October 15, 1967, after a breakdown in bargaining negotiations, Local 6991, United Steelworkers of America, AFL-CIO, struck Cypress. The Union had no dispute with either Auburndale or Minute Maid *or any other employer* which stored its products at the warehouse. Two days later, about fifteen striking Cypress employees began picketing the entrance at Auburndale, ordinarily used by Cypress drivers and the warehouse employees. Occasionally, the railroad siding where it enters the Auburndale plant was also picketed. The pickets carried signs which read as follows:

"Employees of Cypress Garden Citrus Products are ON STRIKE. We have no dispute with any other employer. United Steel Workers of America, Local 6991, AFL-CIO."

After two weeks the pickets had diminished to two in number. The picketing was maintained at all times when the Minute Maid employees were working at the warehouse.

October was a very slack time in citrus operations. Cy-

press sent no trucks to Auburndale while it was being picketed. Neither did Auburndale ship any of the Cypress products via common carrier. Auburndale had nothing to do with product sales.

Auburndale and Minute Maid separately charged the Union with engaging in unfair labor practice. The General Counsel consolidated the cases and issued a complaint that the Union had engaged in picketing, etc., with the object of forcing and requiring Auburndale, Minute Maid, and others to cease using, selling, handling, transporting, or otherwise dealing in the products of and to cease doing business with Cypress, contrary to the statute.

Pursuant to a hearing held in due course, the Trial Examiner concluded that the picketing

> "Induced and encouraged individuals employed by Auburndale *and other secondary employers* (emphasis ours) to cease performing services for their respective employers, and (2) coerced and restrained Auburndale, an object thereof being to force or require Auburndale to cease doing business with Cypress in violation of § 8(b)(4)(i) and (ii)(B) of the Act."

A majority of the Board [3–2] disagreed with the Trial Examiner. It held that Cypress' activities at Auburndale constituted an integral part of the Cypress *production process* (emphasis ours) and that the warehouse, "to the extent that [it] is a part of the Cypress operation" constituted a common situs. The majority further concluded that "the picketing conformed in all respects with Moore Dry Dock requirements for legitimate common situs picketing."

The Board based its decision on "sufficient presence" of the primary employer at the secondary site, that there was a direct and immediate relationship between the picketing and the object of the picketing sufficient to support a finding of purely primary picketing. It held that the concentrate

while stored at the warehouse was, for all practical purposes, under the control of Cypress, that common carriers there received Cypress goods for delivery to Cypress customers.

The dissenting Board Members pointed out that Auburndale was furnishing warehouse services on its own separate premises to various citrus processors, that Cypress employees performed no function at Auburndale other than the delivery of products by truck, that Cypress sent no trucks to Auburndale while picketing was in progress, that Cypress' presence at Auburndale was nothing more than the presence of the "primary employer's product on the separate premises of a neutral employer independently engaged in the business of providing cold storage services to its customers, and that Cypress provided only a minor portion of the Auburndale business."

The dissenting Members further stated that the Board had never hitherto held that the mere presence of a primary employer's goods on the premises of a neutral employer, pursuant to an established business relationship, is sufficient in and of itself to convert the picketing of such neutral premises from unlawful secondary to lawful primary picketing.

These Board Members concluded that "the only possible thrust of Respondent's picketing appeal must have been directed to the neutral Auburndale, to the neutral employees engaged in warehousing tasks, *or to neutral employees of Auburndale's other customers* (emphasis ours). This is the classic example of the secondary boycott proscribed by the statute."

This case is of supreme public importance. The inescapable effect of the Board decision would be to inject a public warehouse operator and other employers who use his facilities into the labor disputes of all customers. A public ware-

house could be subject to picketing at any time a labor organization engages in a dispute with any employer who happens to be a customer of the warehouse. The impact on the general welfare could be expecially critical in those instances where, as here, perishable food products intended for human consumption are substantially involved.

On the undisputed facts in this record we are of the opinion that this case may not properly be decided on strained or ephemeral extensions or constructions of *situs,* applied out of context. The subsidiary question of situs may not obliterate the major question: On the undisputed facts, did the picketing at Auburndale violate the statute?

The statute, 29 U.S.C.A., § 159(b)(4)(i) and (ii)(B) unmistakably makes it an unfair labor practice for a union to coerce or restrain any person with the object of forcing or requiring him to cease * * * handling * * * the products of any other producer or processor except by primary strikes or primary picketing [Fn. 1].

There was no strike against Auburndale or Minute Maid or against the nineteen other employers who stored their products at that warehouse.

The processing plant of Cypress, five miles from Auburndale, was, of course, struck and picketed. That is where the employees of Cypress processed the citrus. That was the real situs of both the dispute and the strike. That was the place for primary picketing. No Cypress employees were at work at Auburndale, and never had been.

The statute prescribes the reviewing role of this Court. We are first to determine if the Board findings are supported by substantial evidence, viewing the record as a whole. Then we are to determine whether the Board correctly applied the law, 29 U.S.C.A., § 160(e)(f). The basic evidentiary facts in this case are not in dispute.

On the undisputed facts it is "quite clear what the truth"

of this case is, see *N.L.R.B.* v. *Smith Industries,* 5 Cir., 1968, 403 F.2d 889, 893. There is no rational basis in this record upon which reasonable men might differ as to the facts.

We hold that the real, indeed the only substantial, object for the picketing at Auburndale, by means of a picket line away from the true situs of the controversy, was to shut down operations at a frozen food storage warehouse in which the stored products of the primary employer then constituted only 5% of the total capacity of the facility and could never have exceeded ten per cent. Inescapably, the purpose was to halt the operations of other employers who were entitled to use not less than 90% of the space and who were total strangers to the whole controversy.

It necessarily follows that the finding of the majority of the Board that the picketing was entitled to primary classification is not supported by substantial evidence from the record as a whole and was legally erroneous.

The picketing was prohibited by the plain terms of the statute.

The Order of the Board dismissing the consolidated complaints is vacated and the case is remanded with directions to enter the cease and desist order recommended by the Trial Examiner.

VACATED and REMANDED, with Directions.

Dissenting Opinion

WISDOM, Circuit Judge, dissenting:—I respectfully dissent.

I. The line between legitimate primary and unlawful secondary activity is relatively easy to draw where the primary and secondary employers have separate work-sites. A more difficult problem is presented in the common situs

cases—"where both the struck employer and 'secondary' or 'neutral' employers are carrying on business activities." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 1969, 394 U.S. 369, 388. As the Board observed, "[i]n determining whether or not the Auburndale warehouse is a common situs the question is whether or not there is sufficient 'presence of the primary' at the secondary site." The Board correctly noted that " 'presence of the primary' is a term of art and refers to a multitude of factors that are to be evaluated in light of the union's presumably permissible 'primary' objective of bringing about a complete cessation of the primary employer's operations." I would hold that the storage and processing of Cypress' concentrate at the Auburndale warehouse was an integral part of the Cypress production process, and the warehouse was a common situs for purposes of Section 8(b)(4)(B) of the Act. As I see it, therefore, the picketing at that situs was lawful primary activity under Section 8(b)(4)(i) and (ii)(B) of the Act.

II. Cypress, the primary employer, processes citrus fruits at its plant in Eloise, Florida. Since 1956 Cypress has been storing its products at Auburndale's cold storage warehouse, located five or six miles from the Cypress plant. This warehouse is staffed by three Auburndale employees—a manager, a secretary, and a maintenance man—and by 30 employees of Minute Maid who, under a contract, perform all the general warehousing services. No Cypress employees work at the warehouse. Auburndale is the sale owner of the warehouse and completely controls its operations.

Minute Maid is a Florida corporation also engaged in the business of processing citrus fruits and juices. Minute Maid owns and operates a plant in Auburndale near the warehouse. Under a lease arrangement, Minute Maid had for twelve years, a first option to lease 135,000 sq. feet of space

in the warehouse for the storage of its products or about fifty percent of the usable warehouse space. Minute Maid, by contract with Auburndale, provides the labor for the performance of all warehousing services at the warehouse. This includes the unloading and loading of trucks and railroad cars and the handling of all products in and out of storage, both with respect to Minute Maid and those of the other customers who utilize the storage space not allocated to Minute Maid. Minute Maid bills Auburndale directly and is paid by the latter for all the warehousing services provided. Auburndale in turn independently bills the other customers. Minute Maid has a superintendent who is responsible for supervising the thirty employees performing the warehouse services. In January 1967, Cypress and Auburndale executed a five-year contract under which Auburndale agreed to furnish Cypress space for up to 300,000 cases of citrus concentrate. This entails approximately 10 percent of the total storage space at the warehouse. Cypress agreed to pay a minimum annual rental of $25,000 for storage space.

In the regular course of business, Cypress trucks haul citrus concentrate to the warehouse, Minute Maid employees drive onto the truck, unload the product, and place it in storage. The Cypress driver does no work at the warehouse and leaves after he is given a receipt. During the peak season for processing citrus fruits, from March through July, Cypress trucks arrive at the warehouse "continuously". Cypress vehicles also come to the warehouse to "deliver orders or releases from the bank" and, on occasion, Cypress drivers pick up concentrate stored in drums at the warehouse and return it to the Cypress plant where it is placed in smaller containers and packed in cases. Generally, however, the storing of concentrate at the warehouse is the final step in the Cypress production process. Upon the sale

of its concentrate, Cypress gives Auburndale an order to ship the product. The product is then loaded by the Minute Maid employees onto the trucks or railroad freight cars of the designated common carrier.

On October 15, 1967, the contract negotiations which the Union and Cypress had been conducting broke down and the Union struck the Cypress plant. The strike was extended to the Auburndale warehouse on October 17. That day strikers appeared at the warehouse and picketed, bearing signs which read:

Employees of Cypress Gardens Citrus Products are ON STRIKE. We have no dispute with any other employer. United Steelworkers of America, Local 6991, AFL-CIO.

The only evidence of a picket's speaking to anyone at the warehouse is the testimony of Auburndale's manager that, on the first day of picketing, he asked "some woman" on the picket line the reason for the picketing and she replied: "Well, you got our product in there".

When the picketing began on October 17, there were as many as 15 pickets at the warehouse; when it ended on or about 21, there were two pickets present. During this period, the pickets patrolled the warehouse entrance used by all truckers and employees working at the warehouse, from the opening of the warehouse in the morning until it closed in the evening. "[A]t times" pickets also patrolled the railroad siding located on Auburndale's property approximately 400 feet from this entrance. While the picketing was in progress, no Cypress truck drivers came to the warehouse. However, Cypress had 150,000 cases of concentrate stored at the warehouse throughout this period. There is no evidence that the picketing interfered with any operations at the warehouse. After the charges herein were filed, the Union stopped picketing and consented to entry of a federal district court order granting a temporary injunction.

The physical presence of the primary's employees on the secondary employer's premises is a relevant factor in determining whether the premises are a common situs. But it is not necessarily the critical factor. Here, although there were no Cypress employees at the Auburndale warehouse during the picketing, there were 150,000 cases of Cypress concentrate at the warehouse. These cases occupied ten percent of the warehousing storage space. They required continuous operations by employees of Cypress, Auburndale, and Minute Maid acting for Auburndale and Cypress. This concentrate while stored in at the warehouse was subject to the control of Cypress. Cypress gave shipping instructions for moving the concentrate from the warehouse to its customers. It is a fair statement that the storage of concentrate in the warehouse subject to disposition by Cypress constituted the final step in the Cypress production process. In the construction industry common situs cases may turn on the presence or absence of the primary's employees at the secondary employer's work-site. *Local 519, United Ass'n of Journeymen, etc.,* v. *N.L.R.B.,* D.C. Cir. 1969, 416 F.2d 1120, 1124. Here, however, the presence or absence of the primary's employees at the warehouse is of less importance than the presence of the primary's product and the close relationship of the warehousing operation to the Cypress production operation as a whole.

III. The peculiar facts of this case distinguish it from common situs cases usually recognized as authoritative. The hearing examiner relied on Warehouse Union Local 6, et al. (Hershey Chocolate Corp.), 153 NLRB 1051, 59 LRRM 1580 (1956), enf'd, 9 Cir. 1967, 378 F.2d 1; Local 868, International Brotherhood of Teamsters (Mercer Storage Co., Inc.), 156 NLRB 67 (1965); Western States Regional Council No. 8, International Woodworkers of America, AFL-CIO (Priest Logging, Inc.), 137 NLRB 352

(1962); and Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen (Fein Cam Corporation, 131 NLRB 59 (1961), enforced 2 Cir. 1962, 299 F.2d, 636. But as the Board pointed out: "In Hershey, Mercer, and Priest the dispositive issue was whether or not the secondary employer was performing struck work and was thus an "ally" of the primary; the issue of common situs was not discussed. In Fein the Primary employer's premises, which were also used by a separate trucking company, were found to constitute a common situs but the issue was not discussed with respect to a separate warehouse used by the secondary employer."

The cases on which the petitioners rely have some elements similar to the elements in the instant case, but are not close enough in the critical facts to carry the weight the petitioners attach to them. For example, in *National Maritime Union* v. *N.L.R.B. (Farmers' Union Grain Terminal Ass'n),* 8 Cir. 1966, 367 F.2d 171, cert. denied, 386 U.S. 959, the primary's employees towed barges up the river, delivered them to a fleeting area where they were tied off, picked up the southbound tows, and returned to St. Louis without ever getting off the barges. The primary employer, therefore, ceased to have any control over the barges or the material thereon after they were tied off, and accordingly maintained no presence on the tows by the time they were picketed. In *McLeod* v. *Local 810, etc., Teamsters, Chauffeurs, Warehousemen & Helpers of America,* E.D.N.Y. 1960, 182 F.Supp. 552, the picketing by the primary employer's production employees occurred at a terminal owned and operated by a trucking company which transferred goods to and from the primary employer's plant under contract. The terminal operated principally as a transfer point where over-the-road drivers deposited their goods for delivery to the primary, and occasionally as a storage point for incoming goods; however, the primary employer had no control over the transportation process, that process was

not in any sense integrated into the production process, and no part of the production process ever occurred at the terminal. Finally, although both *McLeod* v. *United Auto Workers of America, Local 365, AFL-CIO,* E.D.N.Y. 1962, 200 F.Supp. 778, and *Penello* v. *Glass Bottle Blowers Ass'n of U.S. & Canada, AFL-CIO,* D.Md., 1968, 280 F.Supp. 643, involved picketing at a warehouse belonging to a neutral employer and containing the product of the primary employer, in neither case was it either contended or shown that the storage process constituted an integral part of the primary employer's operations over which he retained substantial control. In *McLeod* v. *United Auto Workers,* etc., the primary employer had storage facilities on his own premises, had only stored his products at the neutral employer's warehouse sporadically in the past, and did so on this occasion, as in the past, solely because of a delay in the completion of some financial arrangements with his customer. In *Penello* v. *Glass Blowers,* the primary employer simply shipped in his goods via common carrier to the warehouse for storage and transshipment, retaining no further interest in or control over them.

In sum, I find that there are enough factors establishing the presence of the primary employer at the warehouse to justify the Board's conclusion that the warehouse was a common situs. I do not say that any warehouse is a common situs under the Act for the warehouseman and the primary employer who stores his goods in the warehouse.

IV. Section 8(b)(4) reflects "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B.* v. *Denver Building & Construction Trades Council,* 1951, 341 U.S. 675, 692. In Moore Dry Dock Co., 92 NLRB 547,

549, (1959) the Board attempted to strike a balance by permitting the union to picket at the common situs but requiring it to make every reasonable effort to limit the inherent inducements and restraints of its picket line to the primary employer and to minimize the impact on the neutrals:

> In the kind of situation that exists in this case, we believe that picketing * * * is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer. (Emphasis in original.)

The last two criteria were clearly met: the Union confined its picketing activities to the area surroundng the warehouse and stated on its signs that its dispute was solely with Cypress. Moreover, Cypress maintained a continuous presence at the warehouse during that period. The petitioner contends that Cypress was not engaged in its normal business operations at the situs of the picketing because no Cypress employees appeared at the warehouse throughout the course of the picketing to make deliveries, and therefore that the Union did not comply with the second requirement.

The determination whether an employer is engaged in normal business activities at a common situs even though none of its employees are present "depends in significant part on the reasons for this absence." Brownfield Electric, Inc., 145 NLRB 1163 (1964), and cases cited supra. Here the Cypress storage at the Auburndale warehouse did not require the continued presence of Cypress employees, since, although they delivered additional concentrate to the warehouse for storage, and occasionally returned crates of con-

centrate to the Cypress plant for repackaging before shipment to the customer, the usual storage and shipment process continued whether or not they were present at the situs. In these circumstances, the Board properly found that Cypress was engaged in its normal business operations at the warehouse during the picketing and that the Union picketed the warehouse for the primary object of disrupting those operations.

Here where the primary employer's operation is carried on not only at his own plant but also at a neutral employer's premises, the union must be permitted to appeal to those employees at the latter site who are performing work intimately connected with the struck employer's normal business operations. See, e.g., *United Steelworkers of America, AFL-CIO (Carrier Corp.)* v. *N.L.R.B.*, 1964, 376 U.S. 492, 499–500, in which the Supreme Court held that the union could permissibly appeal to employees of a neutral common carrier on the carrier's own premises because it was furnishing day-to-day service essential to the primary employer's regular operations. See also, *International Brotherhood of Electrical Workers, Local 480* v. *N.L.R.B. (Gulf Coast Bldg. & Supply Co.)*, D.C. Cir. 1969, 413 F.2d 1085, 1090, n. 7.

"The essential factor which renders the analysis in General Electric [1] and Carrier applicable to Auburndale . . . is the integral relationship of the particular facility picketed to the operations of the struck employer . . ." *Samoff* v. *Oil Chemical & Atomic Workers, Local 8–732*, D.C. Del. 1969, 307 F. Supp. 434, 439.[2]

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[1] *Local 761, International Union of Electrical Workers* v. *NLRB* 1961, 366 U.S. 667, 81 S.Ct. 1285, 6 L.Ed.2d 592.

[2] In *Samoff* v. *Oil Chemical & Atomic Workers, Local 8-732*, D.C. Del. 1969, 307 F. Supp. 434, the facts were "quite similar" to the facts in the instant case. The court relied on the Auburndale decision in denying the Regional Director's request for an injunction pending determination whether picketing at a warehouse was unfair labor practice committed against the warehouseman. The court found, as

I would hold that the Board properly determined that to the extent the Union was directing its appeal to common carrier employees arriving at the warehouse, the appeal constituted legitimate primary activity within the meaning of the Act.

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the Board did here, that the secondary employer's warehousing of the primary employer's products was "an integral and substantial part of the [primary employer's] operations. . . . [T]here is a substantial, integral relationship between the operations of Avisum [the primary employer] and Industrial [the owner of the warehouse].

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

177 NLRB No. 108

D-1815

Auburndale, Florida

UNITED STATES OF AMERICA

before the

NATIONAL LABOR RELATIONS BOARD

UNITED STEELWORKERS OF AMERICA, AFL–CIO, AND LOCAL 6991, UNITED STEELWORKERS OF AMERICA, AFL-CIO

Case 12-CC-513-1

and

AUBURNDALE FREEZER CORPORATION

LOCAL 6991, UNITED STEELWORKERS OF AMERICA, AFL-CIO

Case 12-CC-513-2

and

MINUTE MAID COMPANY

DECISION AND ORDER

On February 20, 1968, Trial Examiner William W. Kapell issued his Decision in the above entitled proceeding, finding that Respondents, United Steelworkers of America and its Local 6991, had engaged in certain unfair labor practices as alleged in the complaint, and recommending

that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondents filed exceptions to the Trial Examiner's Decision, and a supporting brief. The General Counsel filed exceptions to the Trial Examiner's Decision.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

Since on or about October 15, 1967, Respondents have been engaged in a labor dispute with Cypress Gardens Citrus Products, Inc.,[1] at its Eloise, Florida, place of business. Since on or about October 17, 1967, and continuing until on or about October 21, 1967, Respondents picketed at the truck entrance and the railroad entrance to a cold storage warehouse in which Cypress stored its product. This warehouse was owned by Auburndale Freezer Corporation.[2] Respondents' pickets carried signs which read as follows:

> Employees of Cypress Gardens Citrus Products are ON STRIKE. We have no dispute with any other employer. United Steelworkers of America, Local 6991, AFL-CIO.

The instant case arises out of the picketing at the Auburndale warehouse.

Cypress is engaged in the business of processing citrus fruits and products. Auburndale, at all times material herein was obligated to Cypress to furnish storage space for up

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[1] Hereinafter referred to as Cypress. The dispute between Cypress and its employees arose out of contract negotiations.

[2] Hereinafter referred to as Auburndale.

to 300,000 cases of citrus concentrate (approximately 10 percent of the storage space) at a specified rental. The warehouse is staffed by three Auburndale employees, a senior managing official, a building maintenance man, and a secretary, and approximately 30 employees of Minute Maid Company [3] who, pursuant to a contract between Auburndale and Minute Maid, perform all warehousing services. No Cypress employees perform work at the warehouse, and there is no common ownership or control of operations (personnel or labor relations) between Cypress and Auburndale or between Cypress and Minute Maid. When the Cypress truck, loaded with concentrate and driven by a Cypress employee, comes onto the warehouse facility from the Cypress plant, the Minute Maid employee drives onto the truck, removes the product and places it in storage. A receipt is given the Cypress driver who then leaves the warehouse facility. Upon the sale of the goods by Cypress, which sales are nonretail, instructions are given to Auburndale to ship the product, which is then loaded by Minute Maid employees onto the designated common carrier's facility.

The Auburndale operation is seasonal, the busiest period being from March to July with the peak in June. During this period Cypress trucks arrive at the warehouse continuously. During the picketing (October 17 to October 21) no Cypress trucks came to Auburndale. Furthermore, no Cypress product was shipped from Auburndale during this period.

The Trial Examiner found, on the above facts, that the picketing took place at the plant of the secondary employer, and that Auburndale, conducting an independent business wholy distinct and separate from that of Cypress, was entirely unconcerned in the dispute between Cypress and Respondents. Relying primarily on *Warehouse Union Local 6,*

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[3] Hereinafter referred to as Minute Maid.

International Longshoremen's and Warehousemen's Union (Hershey Chocolate Corporation), 153 NLRB 1051, and citing for additional support *Local 868, International Brotherhood of Teamsters (Mercer Storage Company, Inc.)*, 156 NLRB 67, *Western States Regional Council No. 3 International Woodworkers of America, AFL-CIO (Priest Logging, Inc.)*, 137 NLRB 352, and *Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen (Fein Can Corporation)*, 131 NLRB 59, the Trial Examiner concluded that the picketing violated Section 8(b)(4)(i) and (ii)(B) of the Act. Then, assuming *arguendo* that the warehouse presented a common situs situation, the Trial Examiner concluded that, because no Cypress trucks approached or arrived at the warehouse and because Cypress was not engaged in its normal business during the time of the picketing, the picketing did not meet all the conditions prescribed by *Moore Dry Dock*.[4]

Contrary to the Trial Examiner we find that the cases relied on are not controlling. In *Hershey*, *Mercer*, and *Priest* the dispositive issue was whether or not the secondary employer was performing struck work and was thus an "ally" of the primary; the issue of common situs was not discussed. In *Fein* the primary employer's premises, which were also used by a separate trucking company, were found to constitute a common situs but the issue was not discussed with respect to a separate warehouse used by the secondary employer. The Trial Examiner noted that no employees of the primary worked at the warehouse and concluded that the picketing there was unlawful.

In determining whether or not the Auburndale warehouse is a common situs the question is whether or not there is sufficient "presence of the primary" at the secondary site, or, to put the matter another way, whether the evidence is sufficient to establish ". . . that direct and immediate rela-

[4] *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547.

tionship between the picketing and the object picketed necessary to a finding of purely primary picketing." [5] In this sense "presence of the primary" is a term of art and refers to a multitude of factors [6] that are to be evaluated in light of the union's presumably permissible "primary" objective of bringing about a complete cessation of the primary employer's operation [7] so long as its efforts are confined to a location of that operation, and of the additional and sometimes countervailing policy of the Act which seeks to protect neutral employers from being pulled into the dispute involving the primary employer.

In the present case, we note the following facts which seem to us relevant to establish the "presence of the primary" at the Auburndale location: (1) Cypress first began storing its product at Auburndale in 1956 under a general warehousing agreement; (2) Cypress and Auburndale executed a 5-year contract in January 1967, whereby the latter agreed to furnish to the former space for 300,000 cases of concentrate; (3) during the picketing Cypress had 150,000 cases of concentrate stored at the Auburndale warehouse; (4) Cypress trucks deliver concentrate to Auburndale in the regular course of business, and during the season, March through July, do so continuously; (5) Cypress drivers remain at Auburndale until they are given a receipt for the concentrate; and (6) the concentrate is shipped

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[5] *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Drivers Local Union No. 807 (Sterling Beverages, Inc.),* 90 NLRB 401.

[6] The presence or absence of the primary employer's employees at the secondary site is merely one factor and is *prima facie* relevant to both the question of whether or not the secondary site is a common situs and of whether or not the picketing is in conformity with the *Moore Dry Dock* standards. See *Seafarers International Union (Salt Dome Production Co.),* 265 F.2d 585 (C.A.D.C., 1959).

[7] See and compare *Local 761, International Union of Electrical Workers (General Electric)* v. *NLRB,* 366 U.S. 667, and *United Steelworkers of America, AFL-CIO (Carrier Corp.)* v. *NLRB,* 376 U.S. 492.

from the Auburndale warehouse by common carriers in accordance with instructions given by Cypress.

These facts indicate that the concentrate, while stored at the Auburndale warehouse, is, for all practical purposes, under the control of Cypress, that the warehouse is the place where common carriers receive Cypress goods for delivery to Cypress' customers, that there is substantial contact between Cypress, its employees, and the Auburndale warehouse, and that the storage of the concentrate at the warehouse, which practice has been continuous since 1956, constitutes an integral part of the Cypress production process.[8] To the extent that the Auburndale warehouse is a part of the Cypress operation, we conclude that the warehouse constitutes a common situs.

We conclude further that Respondents' picketing of the Auburndale warehouse conformed in all respects with the *Moore Dry Dock* requirements for legitimate common situs picketing.[9] In view of our finding that the Auburndale warehouse constituted a common situs because of the continuous "presence" of the Cypress operation at that location, it follows that it was, at all material times, a situs of the dispute. Further it appears from the facts set out above and in the Trial Examiner's Decision that the picketing was as close as possible to the situs and was, by its terms, directed solely to the primary employer, Cypress. While no Cypress trucks came to the Auburndale warehouse during the picketing, the Board pointed out in *Local 3, International Brotherhood of Electrical Workers, AFL-CIO (New Power Wire and Electric Corp.),* 144 NLRB 1089, that ". . . the absence of the primary employer's employees is merely one of the factors to be evaluated in determining . . . whether

[8] *Cf. N.L.R.B.* v. *Servette,* 377 U.S. 46, wherein the term "produce" was given a broad meaning in the context of another portion of Section 8(b)(4).

[9] *Sailors' Union of the Pacific (Moore Dry Dock Company),* 92 NLRB 547.

the primary employer is then engaged in his normal business at the site," and considered ". . . it significant in this case that the absence of company employees was attributable to the fact that a majority of them were on the picket lines . . . ."[10] We find it significant here, as we did in *New Power Wire and Electric Corp., supra,* that the whole Cypress plant was out on strike. However, even if the picket line were viewed, because of the absence of the striking employees from the site, as essentially an appeal to such common carrier employees as might approach the warehouse to pick up Cypress' products, such appeals would, under the circumstances, constitute legitimate primary action.[11]

Accordingly, having found that the Auburndale warehouse constitutes a common situs and that Respondent's picketing was in accord with the requirements of *Moore Dry Dock,* we shall order that the complaint be dismissed in its entirety.[12]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C., June 30, 1969.

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

SAM ZAGORIA, Member

National Labor Relations Board

(SEAL)

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[10] *New Power Wire and Electric Corp.,* 144 NLRB 1089, 1093, 1094.

[11] *Local 761, International Union of Electrical Workers* v. *NLRB, supra; United Steelworkers of America, AFL-CIO* v. *NLRB, supra.*

[12] We are not called upon here to, and do not, decide whether or not Respondents lawfully could have appealed to the Auburndale and Minute Maid employees not to handle the Cypress product.

Chairman McCulloch and Member Brown, dissenting:

We would affirm the Trial Examiner's finding that Respondents' picketing of the Auburndale warehouse violated Section 8(b)(4)(i) and (ii)(B) of Act. Although we agree with the reasoning of the Trial Examiner, further comment is necessary with respect to the majority's departure from established principles in diminishing the protection from direct pressures afforded neutrals under the secondary boycott provisions of the Act.

The picketing of Auburndale was in furtherance of Respondents' primary labor dispute with Cypress, a processor of citrus fruits and products. Auburndale is independently owned and operated and is engaged in furnishing warehouse services on its own separate premises to various citrus fruit processors, one of whom is Cypress. Employees of Cypress perform no functions at Auburndale's premises, other than the delivery of Cypress' products to those premises by truck. Neutral employees perform the task of unloading the trucks and perform all other warehousing tasks, including those related to the ultimate removal of products from storage and their shipment by rail or motor carrier. The picketing of Auburndale occurred not only at the truck entrances but at the railroad siding as well. During the period of picketing no trucks of Cypress were dispatched to make deliveries to the Auburndale warehouse.

The Trial Examiner concluded primarily that the Auburndale premises were not a situs of the Union's dispute with Cypress and for that reason rejected the asserted applicability, as precedents, of decisions involving picketing at the premises of employers directly involved in a dispute with the striking union. Alternatively the Trial Examiner reasoned that, assuming that a common situs might be involved, one of the criteria established by *Moore Dry Dock*[18]

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[18] *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547, cited by the majority at fn. 4, *supra.*

for lawful picketing at such a situs, i.e., that the primary employer must be engaged in its normal business at the situs, was not satisfied because Cypress neither made deliveries to, nor was engaged in its normal business at the site when the picketing took place. Our colleagues would reverse both of these conclusions, finding that the Auburndale premises were a common situs and that the *Moore Dry Dock* standards were satisfied, basing both of these conclusions on the single supposition that there existed a "presence of the primary" employer at the Auburndale warehouse site such as to justify Respondents' picketing, in pursuance of its primary dispute with Cypress, at that site.

We cannot agree that this is so. We believe it to be apparent that, expressed in simple terms, the "presence" of the primary employer postulated by our colleagues can mean nothing else, in this case, than the simple presence of that primary employer's product on the separate premises of a neutral employer independently engaged in the business of providing cold storage and warehouse services to its customers. Here the employees of the primary employer, Cypress, perform no function at all in connection with the warehousing services, and the storage of Cypress' products provides but a minor portion of the business of Auburndale, the warehousing enterprise. The Board has not hitherto held, as the majority does here, that the mere presence of a primary employer's goods on the premises of a neutral employer, pursuant to an established business relationship, is sufficient in and of itself to convert the picketing of such neutral premises from unlawful secondary to lawful primary picketing.[14]

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[14] See, e.g., *Warehouse Union Local 6, et al. (Hershey Chocolate Corporation)*, 153 NLRB 1051; *Western States Regional Council No. 3, International Woodworkers, (Priest Logging, Inc.)*, 137 NLRB 352, enfd. 319 F.2d 655 (C.A. 9); *Local 810, Steel, Metals, Alloys and Hardware Fabricators, (Fein Can Corporation)*, 131 NLRB 59. *Cf. National Maritime Union of America, et al. (Farmers Union Grain*

That such is indeed our colleagues' holding here must not be obscured by their reference to precedent to demonstrate that the presence or absence of a primary employer's employees from the premises picketed is not in itself determinative of the validity of the picketing. With that proposition we agree. But we nevertheless cannot agree that it has any applicability to this case. Our understanding of the decision cited [15] and similar precedents[16] is that they have reference to situations in which employees of the primary employer are normally engaged in tasks at the picketed premises but are absent because of a strike, because the primary employer has withdrawn them to avoid the effect of picketing, or because of a workbreak, or for some other similar reason. Here no employees of Cypress, the primary employer with whom Respondents had their dispute, had ever performed tasks at the picketed premises.[17] Such employees were not simply "absent." They never were there. In this situation, the only possible thrust of Respondents' picketing

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Terminal Association), 152 NLRB 1447, 1457-58, enfd. 367 F.2d 171 (C.A. 8); *Teamsters, Chauffeurs & Helpers Union, Local 279 (Wilson Teaming Co.),* 140 NLRB 164.

We distinguish, of course, such cases as those involving "struck work" or an "ally" relationship, where the employer asserted to be neutral would not normally handle or work on the products of the primary employer were it not for the existence of a strike at the primary employer's plant. We understand that that type of situation is not involved here.

[15] *New Power Wire and Electric Corp.,* 144 NLRB 1089.

[16] See, e.g., *Seafarers International Union* v. *NLRB,* 265 F.2d 585, 590; *International Brotherhood of Electrical Workers, et al. (Plauche Electric Inc.),* 135 NLRB 250.

[17] As noted above, the drivers who brought the Cypress products to the Auburndale warehouse did no more than drive their trucks to the dock, wait for neutral employees to unload them, obtain a warehouse receipt, and depart. We do not understand Respondents to contend that it was engaged in ambulatory picketing of the trucks. But even if it were, the Board would require that such picketing be strictly limited to the trucks, and not extended in any manner to Auburndale or other neutrals.

appeal must have been directed to the neutral Auburndale, to the neutral employees engaged in warehousing tasks, or to the neutral employees of Auburndale's other customers. This is the classic example of the secondary boycott proscribed by the statute.

Dated, Washington, D. C., June 30, 1969.

FRANK W. MCCULLOCH, *Chairman*

GERALD A. BROWN, Member
National Labor Relations Board

TXD-102-68

Auburndale, Fla.

TRIAL EXAMINER'S DECISION

(Numbers and Title Omitted)

WILLIAM W. KAPELL, Trial Examiner: This matter, a proceeding under Section 10(b) of the National Labor Relations Act, as amended, herein called the Act, was heard at Tampa, Florida, on November 21, 1967,[1] with all parties participating pursuant to due notice upon a complaint issued by the General Counsel on November 7,[2] alleging violations of Section 8(b)(4)(i) and (ii)(B) of the Act, by United Steelworkers of America, AFL-CIO, and Local 6991, United Steelworkers of America, AFL-CIO, hereafter referred to individually and collectively as Respondents.

The complaint, in substance, alleges that Respondents unlawfully picketed the truck entrance and a railroad sid-

[1] All dates hereafter refer to the year 1967 unless otherwise noted.

[2] Based upon a charge filed on October 19 in Case 12-CC-513-1 by Auburndale Freezer Corporation, hereafter called Auburndale, and a charge filed on October 20 by Minute Maid Company, hereafter called Minute Maid.

ing to the premises of Auburndale, an object thereof being to force Auburndale, Minute Maid, and other persons to cease handling the products of Cypress Gardens Citrus Products, Inc., herein called Cypress, and to cease doing business with Cypress. Respondents contend that the picketing was directed solely at employees furnishing day-to-day delivery service essential to Cypress' regular operations, that the picket signs were explicit, and that their dispute was solely with Cypress, and that, therefore, they were engaged in lawful primary activity.

All parties were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and to file briefs. The General Counsel and Respondents filed briefs which have been duly considered. Upon the entire record in the case, and from my observation of the witnesses, I make the following:

Findings of Fact

I. Commerce

Auburndale, a Florida corporation, is the sole owner and operator of a cold-storage warehouse located at Auburndale, Florida, where it is engaged in the business of public cold-storage warehousing. In the course and conduct of said business operations, it annually causes citrus products valued in excess of $50,000 to be shipped from its warehouse to points located outside the State of Florida.

Minute Maid, a Florida corporation, owns and operates a plant at Auburndale, Florida, where it is engaged in the business of processing fruits and juices, and annually sells and ships products valued in excess of $50,000 to points outside the State of Florida. At all times material herein, Minute Maid leased about 50 percent of the space in Auburndale's warehouse for the storage of its citrus products.

Cypress, a Florida corporation with a plant and principal place of business located at Eloise, Florida, is engaged in the business of processing citrus fruits and products, and an-

nually ships such products valued in excess of $50,000 to points located outside the State of Florida.

Respondents admit, and I find, at all times material herein, that Auburndale, Minute Maid, and Cypress were engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

Respondents admit, and I find, that, at all times material herein, they have been labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Background*

Auburndale's premises have two entrances, a truck entrance (also used for ingress and egress of employees) and a railroad siding entering its premises about 400 feet from its warehouse. It warehouses products (mostly citrus) for about 20 customers, including Cypress and Minute Maid. In its operations it directly employs only three individuals, consisting of the general manager, a maintenance man, and an office secretary, but has an arrangement with Minute Maid pursuant to which about 30 Minute Maid employees, supervised by their superintendent (who receives his orders from Auburndale's general manager), perform the work of unloading incoming deliveries and placing their contents in storage, and also service outgoing shipments by removing products from storage and loading them on trucks, or freight cars.[3]

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[3] Ordinarily, Cypress sent its products for storage in its own trucks to Auburndale's truck platform where they were unloaded and placed in storage by the Minute Maid employees. Occasionally, Cypress sent its trucks to the warehouse to return some of its products to its own plant for further processing. When Cypress sold any of its storaged products, it instructed Auburndale to ship them via a designated common carrier, and Auburndale would make delivery to that carrier.

At all times material herein, Auburndale was obligated by contract with Cypress to furnish storage space for up to 300,000 cases of citrus concentrate, which approximated about 10 percent of the warehouse space, at a specified rental scale. The products of Cypress and other customers are not co-mingled, nor was any designated space reserved for such storage purpose.

B. *The Facts*

The facts concerning the issue herein are not in dispute. Cypress, which is located at Eloise, Florida, about 5 or 6 miles from Auburndale, was struck by Respondents about October 15, following a breakdown in their bargaining negotiations. At no time material herein have Respondents been engaged in any labor dispute with Auburndale or any of its customers other than Cypress. In furtherance of their labor dispute with Cypress, Respondents on about October 17 began picketing the truck entrance to Auburndale, and also on occasion at the railroad siding where it enters the premises of Auburndale.[4] The picket signs carried by the pickets read as follows: "Employees of Cypress Gardens Citrus Products are ON STRIKE. We have no dispute with any other employer. United Steelworkers of America, Local 6991, AFL-CIO."[5] Picketing occurred during such times as the Minute Maid employees were working at the warehouse. At first, about 15 pickets appeared, milling around the truck entrance, but toward the end only two pickets appeared. On the first day of picketing, Auburndale's general manager approached the picket line to inquire as to the reason for picketing, and was told by one of

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[4] The picketing continued for two weeks, until called off pursuant to a stipulation entered into by the parties in an injunction proceeding commenced in the United States District Court, pending adjudication of the issue by the Board.

[5] Although the picket signs bore only the name of the local, the answer of each Respondent admitted the picketing.

the pickets, "well, you got our product in there." It also appears that Cypress did not send any of its trucks to Auburndale during the picketing. Nor does the record show that Auburndale shipped any of Cypress' products via a common carrier while the picketing took place.

C. *The Issue Involved*

Respondents justify the picketing as lawful on the ground that it was directed solely at employees furnishing day-to-day services essential to Cypress' operations at a "partial" situs (on the premises of Auburndale) of the dispute between the primary employer (Cypress) and the Unions.[6] In support of their position, the Unions claim that the facts of the instant case fall within the ambit of *Local 761, I.U.E., etc.* v. *N.L.R.B.,* 366 U.S. 667 (popularly known as the *General Electric* case), and *United Steelworkers* v. *N.L.R.B.,* 376 U.S. 492, (usually referred to as the *Carrier* case).

In *General Electric,* that company was the primary employer engaged in a dispute with its own employees at its *own* plant. A number of subcontractors were performing various services for General Electric at the plant's site. Separate gates were clearly designated for the exclusive use of these subcontractors, whose work was of different types, consisting of routine maintenance services—which at times were performed by General Electric's own employees—and occasionally specialized work of a capital-improvement nature. Because of unsettled grievances, the union struck General Electric and picketed all entrances to its premises, including the gate reserved for the subcontractors' employees. The Board held that the picketing at the reserved gate was to enmesh the employees of the neutral subcontractors, and threfore violated former Section 8(b)(4)(A) (now, in pertinent part, 8(b)(4)(B)) of the Act. The Circuit

[6] In their opening statement, Respondent disclaimed any defense based on the "allied" doctrine or that they were following or picketing a product.

Court of Appeals enforced the Board's order. Upon appeal, the Supreme Court reversed the Board and the Circuit Court and ruled that picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employer's premises is lawful primary activity unless the following conditions exist.

> "There must be a separate gate, marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer, and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations."[7]

The Court further indicated that, if there was a "mingled use" of the reserved gate, the picketing would be primary, unless the work of the independent contractors not meeting either of the latter two conditions, referred to above, was "so insubstantial as to be treated by the Board as *de minimis.*" Inasmuch as the record theretofore made failed to show the extent to which the reserved gate had been used by the employees of the independent contractors in the performance of "conventional maintenance work necessary to the normal operation" of General Electric, the case was remanded to the Board. The Board, upon remand to determine whether the conditions set forth by the Supreme Court were satisfied, found (138 NLRB 342) that the work (other than conveyor work) scheduled to be performed by the subcontractors was necessarily related to General Electric's normal operations and constituted more than a *de minimis* amount, and it, therefore, held that the picketing was lawful primary picketing and dismissed the complaint.

In *Carrier,* that company was engaged in a dispute with its employees, at its *own* plant. The union's picketing in

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[7] *Local 761, IUE (General Electric Co.)* v. *NLRB, supra,* 366 U.S. at 631.

question took place at the gate on a railroad spur track, owned by the railroad, which was cut through a fence surrounding the struck employer's premises. This gate was used exclusively by neutral railroad employees entering the struck premises to make delivery of supplies to, and removal of manufactured products from, Carrier. The Board held (132 NLRB 127) that the railroad's services were rendered in connection with Carrier's normal operations, and that, therefore, the Union did not violate Section 8(b)(4)(i) and (ii)(B) of the Act by its picketing of the gate. Upon appeal, the Supreme Court, *supra,* approved the Board's application of the standards set forth in *General Electric* so as to permit, as legitimate primary action, the involved picketing.

Unlike *General Electrict* and *Carrier,* both of which involved picketing at the *premises* of a *struck* employer, the picketing in the instant case occurred at the plant of a secondary employer (Auburndale), located some 6 miles from Cypress' plant, the situs of the dispute. Auburndale was conducting an independent business wholly distinct and separate from Cypress, in which none of Cypress' employees were employed. Moreover, Auburndale was entirely unconcerned in the dispute between Cypress and Respondents, and sought only to carry on its regular normal operations. In these circumstances, I find that *General Electric* and *Carrier* are sufficiently distinguishable as not to be applicable herein. The instant case closely resembles *Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union (Hershey Cholocate Corporation),* 153 NLRB 1051. There, the Board held that the involved union violated Section 8(b)(4)(i) and (ii)(B) by picketing (with signs disclosing the identity of the primary employer) an independent warehouse which stored goods of the primary employer since the picketing induced employees of a neutral employer not to handle the primary employer's products, an object thereof being to force the neutral em-

ployer to cease doing business with the primary employer. See also *Local 868, International Brotherhood of Teamsters (Mercer Storage Co., Inc.) (Mid-County Buick Inc.),* 156 NLRB 67; *Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, etc. (Fein Can Corporation),* 131 NLRB 59; *and Western States Regional Council No. 3, International Woodworkers of America, AFL-CIO, et al. (Priest Logging Inc.),* 137 NLRB 352.

I, therefore, conclude that the picketing at Auburndale (1) induced and encouraged individuals employed by Auburndale and other secondary employers to cease performing services for their respective employers, and (2) coerced and restrained Auburndale, an object thereof being to force or require Auburndale to cease doing business with Cypress in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

Even assuming, *arguendo,* that common situs[8] picketing is involved herein, as Respondents appear to assert, I would, nevertheless, also find the picketing violative of Section 8 (b)(4)(i) and (ii)(B). For, if the picketing occurred at a common situs, then all the conditions[9] prescribed in *Moore Dry Dock Company* (92 NLRB 547) must be observed. It appears, however, that no trucks of Cypress approached or arrived at the premises of Auburndale, nor was it engaged there in its normal business, at any time while the picketing was in progress. Thus, in *Teamsters, Chauffeurs & Helpers Union, Local 279 (Wilson Teaming Company),* 140 NLRB 164, where the union picketed with signs identifying the pri-

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[8] A common situs is where two or more employers are performing separate tasks on common premises.

[9] They are (1) the picketing is strictly limited to the times when the situs of the dispute is located on the secondary employer's premises, (2) at the times of the picketing the primary employer is engaged in its normal business at the situs, (3) the picketing is limited to places reasonably close to the locations of the situs, and (4) the picketing discloses clearly that the dispute is with the primary employer.

mary employer (Wilson, a trucker) at the premises of the secondary employer (Morehouse) after the employees of Wilson left a trailer truck there for the delivery of merchandise, and departed (as was their usual practice), and while the secondary employees began to unload the truck, the Board held that when the primary employer left the premises, his work was complete until the time to haul the empty trailer away, and that under the *Moore Dry Dock* criteria the primary employer was not engaged in normal business at the site of the secondary employer and his work was not being picketed, but the secondary employer's work of unloading was. The Board, therefore, concluded that the union violated Section 8(b)(4)(i) and (ii)(B) since the union picketed the secondary employer while the primary employer was not engaged in his normal business at Morehouse.

A *fortiori,* in the instant case, Cypress neither made deliveries to nor was engaged in its normal business at Auburndale when the picketing took place. Accordingly, I conclude that even assuming that Auburndale's premises was a common situs, the picketing violated Section 8(b)(4)(i) and (ii)(B) because it failed to satisfy the *Moore Dry Dock* criteria.

IV. The Effects of the Unfair Labor Practices Upon Commerce

The activities of Respondents set forth above, occurring in connection with the operations of Auburndale, Minute Maid, and Cypress, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregonig findings of fact and upon the entire record in these cases, I make the following:

Conclusions of Law

1. Auburndale, Minute Maid, and Cypress are employers engaged in commerce within the meaning of Sections 2(6) and (7) and 8(b)(4) of the Act.

2. By inducing and encouraging individuals employed by Auburndale and other secondary employers to cease performing services for their respective employers, with an object of forcing or requiring Auburndale to cease doing business with Cypress, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(B) of the Act.

3. By coercing and restraining Auburndale and other secondary employers with an object of forcing or requiring Auburndale to cease doing business with Cypress, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondents violated Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend that they be ordered to cease and desist therefrom and to take certain action to effectuate the policies of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in these cases, I recommend that Respondents, United Steelworkers of America, AFL-CIO, and Local 6991, United Steelworkers of America, AFL-CIO, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducing and encouraging any individual employed by Auburndale Freezer Corporation or by any other employer, to engage in a strike or refusal in the course of his employment to perform any services with an object of forcing or requiring Auburndale Freezer Corporation or any other employer to cease doing business with Cypress Gardens Citrus Products, Inc.

(b) Threatening, coercing, or restraining Auburndale Freezer Corporation or any other employer, with an object of forcing or requiring Auburndale Freezer Corporation to cease doing business with Cypress Gardens Citrus Products, Inc.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Post at its business office, meeting halls, and other places where Respondent Local 6991, United Steelworkers of America, AFL-CIO, customarily posts notices, copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 12 shall be posted by the Union, after being duly signed by a representative of each Respondent, immediately upon receipt thereof, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the said Regional Director copies of

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[10] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

the aforementioned notice for posting by Auburndale Freezer Corporation, if it be willing, at places where it customarily posts notices to its employees.

(c) Notify the Regional Director for Region 12, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent Local 6991, United Steelworkers of America, AFL-CIO, has taken to comply herewith.[11]

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[11] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 12, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

Dated at Washington, D. C., Feb. 20, 1968.

Certified True Copy

O. W. FIELDS,
Executive Secretary, NLRB

Date Feb. 20, 1968

Appendix

NOTICE

TO ALL MEMBERS OF UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND LOCAL 6991, UNITED STEELWORKERS OF AMERICA, AFL-CIO; AND TO ALL EMPLOYEES OF AUBURNDALE FREEZER CORPORATION.

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT induce or encourage any individual employed by Auburndale Freezer Corporation or any other employer, to engage in a strike or refusal in the course of their employment to perform any services

with an object of forcing or requiring Auburndale Freezer Corporation or any other employer to cease doing business with Cypress Gardens Citrus Products, Inc.

WE WILL NOT threaten, coerce, or restrain Auburndale Freezer Corporation, with an object of forcing or requiring Auburndale Freezer Corporation to cease doing business with Cypress Gardens Citrus Products, Inc.

UNITED STEELWORKERS OF AMERICA, AFL-CIO
(Labor Organization)

Dated..... By.....
(Representative) (Title)

LOCAL 6991, UNITED STEELWORKERS OF AMERICA, AFL-CIO
(Labor Organization)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 706, Federal Office Building, 500 Zack Street, Tampa, Florida 33602, Telephone 228-7711.